ORIGINAL

No. 87-730

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTINE MEYER, ET AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct in applying a presumption of vindictiveness in the pretrial context when the facts overwhelmingly demonstrated a realistic likelihood of prosecutorial misconduct.
2. Whether a district court's dismissal of the remaining charge in a vindictive prosecution case constitutes an abuse of discretion where, due to the prosecutor's conduct, such dismissal is the only remedy available to the court.

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Judith Hand, respondent in this proceeding, respectfully requests that the Court deny the United States' petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY OF ARGUMENT

The government has wholly failed to justify the grant of certiorari in this case. It exaggerates the reach of the appellate court's holding to create the illusion that the Court of Appeals' decision is inconsistent with this Court's precedents. The government fears that its misconduct here has sparked district and appellate court decisions that threaten its pretrial charging authority. However, as correctly stated by Circuit Judge Laurence Silberman, the "unseemly prosecutional maneuvering"[1] that occurred here fortunately is not common, and the government's fear is groundless with respect to appropriate charging decisions.

The government claims the Court of Appeals disregarded this Court's rulings in several respects. First, it asks the Court to find, under its Goodwin[2] decision, that a presumption of

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1/ Order vacating order granting rehearing en banc, concurring Opinion of Judge Silberman, Appendix ("App.") to Government's Petition ("Pet.") for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, at 35a.

2/ United States v. Goodwin, 457 U.S. 368 (1982).

vindictiveness can never arise in the pretrial setting, no matter how forcefully the facts demonstrate a realistic likelihood of vindictiveness. However, the Court of Appeals correctly rejected this interpretation of Goodwin and found that the facts here demonstrated overwhelmingly the likelihood of prosecutorial retaliation. Second, the government argues that this Court should find that the punitive addition of a charge is acceptable as plea bargaining. Yet, even the government concedes that no plea bargaining occurred in this case. Third, the government asks this Court to find that the remedy fashioned by the Court of Appeals is dangerously overbroad and suggests instead that this Court ignore the misconduct found here. The Court of Appeals correctly found that the remedy, though extreme, was not an abuse of discretion, given the egregious facts of this case. Finally, the government asks this Court to overlook the due process violation that occurred in the instant case and instead to advance the government's apparent interest in controlling unruly demonstrators who opt to go to trial. The government's portrait of the chaos this case will create is fallacious and, in any event, cannot justify the due process violation committed here.

Because the decision of the Court of Appeals is correct, we urge the Court to decline to issue a writ of certiorari. In view of the soundness of the Court of Appeals' decision, the government's request for summary dismissal does not merit a reply.

STATEMENT OF THE CASE

A. Arrest And Charging

On April 22, 1985, Judith Hand was arrested with 195 other individuals by the United States Park Police.[3/] Each arrestee received a Park Police Citation Form which described the alleged violation as "Demonstrating Without A Permit." Such a violation

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3/ Ms. Hand joined with other demonstrators in a rally titled, "Peace, Jobs, and Justice." It is alleged that the arrestees seated themselves in the driveway of the White House, sparking the revocation of their permit and giving rise to a charge of a violation of 36 CFR § 50.19 (1985).

carries a maximum penalty of six months in jail and a $500 fine. The Citation Form provided Judith Hand and the other demonstrators with two options: forfeit $50 in collateral, in full satisfaction of the charge and without necessity for a court appearance, or proceed to trial on the charge.

In light of these options, some demonstrators elected to forfeit collateral; some did not respond at all. Ms. Hand, with certain other arrestees, decided to challenge the basis for her arrest and chose to go to trial on the charge.

B. Post-Arrest

A May 15, 1985 arraignment was scheduled. Tr. 15.4/ However, the notices were sent to defendants only several days before the scheduled date; and consequently, none of the defendants appeared. Id. The prosecutor had not prepared the criminal informations, and there was no discussion of the charge. Id.; Tr. 46. However, counsel for defendants did inform the Assistant U.S. Attorney that defendants (also referred to herein as "respondents") had elected to go to trial. Tr. 15-16; Tr. 46. Due to the large number of defendants, arraignments were scheduled for three days -- May 28, June 21, and June 27. Tr. 15.

Aside from this meeting, it is undisputed that defendants and their counsel had no contact with the prosecutor from the date of arrest to the first arraignment date. Tr. 46-47.

C. Arraignment

1. May 28 Arraignment

After learning that the defendants intended to go to trial, the government added a second charge, obstructing the sidewalks adjacent to the White House in violation of 36 C.F.R. § 50.30 (1985), against only those defendants, including Judith Hand, who chose to go to trial. The obstruction charge also carries a

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4/ All transcript references ("tr.") are to the transcript for the September 11, 1987 hearing. A copy of the transcript is attached to the brief in opposition filed by Sebastian Graber, Esq., on behalf of a number of respondents, on December 31, 1987.

maximum penalty of six months' imprisonment and a $500 fine, thus raising the defendants' exposure substantially to a maximum of one year in prison and a $1,000 fine.

At this first day of arraignments, the charges were never read to defendants; and the defendants were made aware of the added charge only after they informally entered their pleas of not guilty . Tr. 15; Tr. 42. No plea offer was made to these defendants at any time, formally or informally. Tr. 42.

2. June 21 And 27 Arraignments

The defendants arraigned on these dates also were subject to the additional charge. However, an informal offer was made by the prosecutor to drop one charge in return for pleading no contest to the other. Tr. 34, 42. This plea offer was explicitly held open only for the day of arraignment. A number of defendants chose this option, and they were sentenced to terms of unsupervised probation. Pet. at 3. Many, however, pled not guilty and requested trial and thus faced the original and added charge. Id. Many of these individuals expressed the desire to appear pro se.

D. Pre-Trial Motions And Disposition

On July 30, 1985, counsel for defendants moved to dismiss the informations, alleging vindictive prosecution. On the basis of the additional charge, counsel also requested a jury trial.

Chief Judge Aubrey Robinson granted the motion for a jury trial and found that serious questions had been raised about prosecutorial vindictiveness that warranted further exploration. He scheduled the motion to dismiss for argument on the trial date, September 11, 1985.

E. September 11 Hearing

Chief Judge Robinson began the hearing by granting the Assistant U.S. Attorney's motion to dismiss the charge which had been added after defendants requested trial. Tr. 3. The undisputed effect and intent of the government's dismissal was to deprive the defendants of their right to a jury trial. Pet. at 3.

The court then heard argument on the issue of vindictive prosecution and found the facts as follows. The defendants were arrested en masse for one violation and were given the option of forfeiting collateral or going to trial on that violation. Tr. 27. However, those who opted to go to trial suddenly faced not one, but two violations, and the only motivation for the second charge was the defendants' decision to go to trial. Id. The circumstances giving rise to the arrest had not changed -- i.e., no new information justified the addition of a second charge. Id.[5/] To the Chief Judge, it was clear that the prosecutor's motivation was improper.

Chief Judge Robinson established that no contact occurred between the government and the defendants between arrest and arraignment. Tr. 45-47. Thus, there was no notice that an additional charge would be brought. Id. Chief Judge Robinson emphatically rejected the notion argued by the prosecutor that the additional charge was justified by the occurrence of plea bargaining and found that plea bargaining cannot occur when one side does not know about the plea. Tr. 33. He found the U.S. Attorney's argument that the added charge resulted from an analysis of the societal interest in the prosecution to be incredible, in the absence of new facts to support such an analysis. Tr. 49.

Chief Judge Robinson ruled that the finding in Goodwin that no presumption of vindictiveness was appropriate in the facts presented there, did not control the case before him. Tr. 47-48. He concluded that the undisputed evidence provided a "clear indication" that the government improperly "upped the ante . . . with no notice, no consultation, with no opportunity for you to make an election." Tr. 50. Consequently, the Chief Judge dismissed the informations. Id.

5/ See Pet. at 4 n. 3.

F. Motion For Reconsideration And Disposition

The government, by written motion, asked Chief Judge Robinson to reconsider his oral ruling. He denied the government's motion and held that Goodwin does not completely foreclose a finding of vindictiveness based on objective evidence in the pretrial setting. App. at 56a. He affirmed his conclusion that the sole basis for the additional charge was defendants' decision to go to trial and reiterated his finding of improper prosecutorial motivation. App. at 57a.

G. Court of Appeals Decision

On appeal, this case came before Chief Judge Patricia Wald, Judge Abner Mikva, and Judge Charles Leighton (sitting by designation) for argument. While declining to reach the question whether the government had displayed actual vindictiveness, the Court of Appeals found that the defendants had presented sufficient evidence to justify a presumption of vindictiveness. It further found that the government had failed to present evidence to "erase" such a finding. App. at 6a.

The Court of Appeals rejected as "unpersuasive" the government's argument that this Court's Goodwin decision stands for the proposition that a presumption of vindictiveness can never arise pretrial. App. at 7a. The Court of Appeals interpreted Goodwin to establish that "proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in the pretrial context," because this sequence of events does not present a realistic likelihood of vindictiveness. Id. The Court of Appeals focused its inquiry on the issue framed by Goodwin and subsequent cases: whether the circumstances as a whole present a realistic likelihood of vindictiveness. App. at 7a-8a.

The Court of Appeals determined that the facts of this case combined to suggest retaliatory motivation. App. at 8a. Most compelling among these facts was the extreme and inexplicable discrepancy in treatment between those who chose to go to trial and those who forfeited collateral, when the facts underlying the

charging decision against both sets of defendants were identical. Id. This discrepancy, the Court found, gave rise to the suspicion that defendants received different treatment because of their differing decisions on a trial. Id.

The Court of Appeals also found that the "simplicity and clarity of both the facts and law . ... heighten[ed]" the suspicion of retaliation. App. 9a. It observed that officials frequently must make charging decisions with "incomplete information or understanding." Id. However, this case presented no such problem of understanding and analysis. Id.

The Court's suspicion of retaliation was confirmed by the government's decision to drop the added charge when the charge inconveniently gave rise to the right to a jury trial. Id. This course of conduct demonstrated to the appellate court a "disturbing willingness to toy with the defendants" that the district court could properly take into account in assessing the likelihood of retaliation. App. at 9a-10a.

The appellate court also noted that a number of factors in this case combined to give rise to a strong motivation for the government to act vindictively. App. at 10a. A large group of defendants charged with "petty offenses," many of whom intended to proceed pro se, raising First Amendment claims, threatened to force the government to participate in a drawn-out legal proceeding. Id. The government would be strongly tempted to seek to punish the defendants who caused this burden. Id.

The Court of Appeals rejected he argument that the apparently retaliatory motivation for the increase in charges was vitiated by the fact that the prosecution had added a charge in the "routine" course of review. App. at 11a. The appellate court emphasized that the presumption of vindictiveness does not hinge upon the continued involvement of any individual but, rather, refers to the "conduct of the government as a whole." Id. For the same reason, the Court of Appeals found the fact that the first charge was made by a non-lawyer to be irrelevant. Id. "To do otherwise," it stated, "would be to ignore that the

decision to punish defendants . . . arises more often from institutional than from personal wellsprings." Id.

The Court of Appeals rejected the government's argument that a failure to reverse the District Court would hamper the functioning of the magistrates' citation system. App. at 12a. In so holding, the appellate court noted the following facts: the government is bound to charging decisions made at arrest in the absence of a request for trial; the application of the pre-trial presumption of vindictiveness is limited; the government possesses the ability to rebut the presumption; and the government is able to legitimize its conduct by providing notice of the possibility of enhancement of charges upon request for a trial. App. at 12a-13a.

With respect to the remedy, the Court of Appeals found that the district court's dismissal of the remaining charge based upon the particular facts of the case at hand did not constitute an abuse of discretion. In rejecting the government's argument that a court, when confronted with prosecutorial vindictiveness, has authority only to dismiss the additional "tainted" charge, the Court of Appeals found that neither case law nor reason supported such a broad limitation on the remedial authority of district courts in cases marked by prosecutorial vindictiveness. App. at 14a. Rather, the Court of Appeals found that "[t]he government's position, if accepted, would remove the deterrent effect of the doctrine of prosecutorial vindictiveness -- a doctrine which the Supreme Court designed to be largely prophylactic in nature." Id.; citation omitted. In concluding, the Court of Appeals noted that the remedy imposed was extreme and counselled against the routine imposition of this broad remedy; however, the Court of Appeals refused to find that the district court judge acted impermissibly given the undisputed and particular facts of this case. App. at 15a.

REASONS FOR DENYING THE WRIT

1. a. The government contends that the Court of Appeals' decision in this case disregards this Court's holding in Goodwin,

where, according to the government, this Court held that a presumption of vindictiveness "should not be applied in the pretrial stage at all," due to "circumstances common to the pretrial stage of all cases." Pet. at 9. The government faults the Court of Appeals for looking to the facts of this case, which clearly distinguish it from Goodwin and present a realistic likelihood of vindictiveness.

In Goodwin, as the government concedes and as the Court of Appeals correctly found, this Court focused on the "'mere fact'" that the defendants refused to plead guilty and the prosecutor subsequently added a charge. Pet. at 8. No other evidence of vindictiveness was presented. 457 U.S. 380-81.[6/] This sequence of events, this Court found, did not warrant the application of a presumption because it is unlikely that a prosecutor would respond to a jury trial demand by bringing charges solely as a punishment to the defendant's assertion of this right. 457 U.S. at 384. This Court speculated, in the absence of record evidence, that new information might have shaped the prosecutor's charging decision or that the prosecutor's legal theories may not have crystallized. 457 U.S. at 381. The Goodwin Court also determined that the defendant's demand for a jury trial did not support establishment of a presumption, because the government must put on its case whether before a judge or a jury and thus had the same "stake" in the proceeding. 457 U.S. at 383. To arrive at this conclusion, the Court thus looked to the factual setting of that case.

The Court of Appeals in the instant case properly interpreted Goodwin to hold that a pretrial demand for a jury trial, followed by a prosecutorial increase in charges, does not alone give rise to a presumption because a realistic likelihood of vindictiveness cannot be found to exist in such circumstances. However, according to the Court of Appeals, this Court in Goodwin did not "adopt a per se rule that in the pretrial context no

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6/ Indeed, only evidence to rebut vindictiveness was introduced in Goodwin. 457 U.S. at 371 n.2.

presumption of vindictiveness will ever lie." App. at 7a. It correctly interpreted Goodwin to require examination of the circumstances of the case to determine whether a realistic likelihood of vindictiveness existed.

The cases cited by the government as inconsistent with the Court of Appeal's interpretation of Goodwin (Pet. at 8) in fact reinforce this analysis and belie the government's position. Thigpen v. Roberts, 468 U.S. 27, 30 n.4 (1984); United States v. Oliver, 787 F.2d 124, 126 n.1 (3d Cir. 1986); United States v. Martinez, 785 F.2d 663, 668-69 (9th Cir. 1986); Wasman v. United States, 468 U.S. 559, 568 (1984); and United States v. Gallegos-Curiel, 681 F.2d 1164 (9th Cir. 1982) all interpret Goodwin as did the Court of Appeals in this case: the application of a presumption of vindictiveness depends upon the facts of the case -- i.e., on the presence of a realistic likelihood of vindictiveness -- and no such likelihood is presented solely by the enhancement of charges following a jury trial demand. Indeed, Martinez and Gallegos-Curiel implicitly recognize that a pretrial presumption of vindictiveness can arise when a realistic likelihood of vindictiveness is established by the facts.7/

b. The government next argues that even if the court of appeals was correct in its interpretation of Goodwin, the distinctions drawn by the appellate court between this case and Goodwin do not support a finding that the prosecutor's charging decision in this case was vindictive. The government's argument asks this Court to ignore the facts of the instant case, facts

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7/ In Gallegos-Curiel, per Kennedy, J., contrary to the government's contention (Pet. at 8), the Ninth Circuit did not hold "the presumption of vindictiveness inapplicable to pretrial charging decisions." What the court of appeals did hold is that a "presumption applies only to the extent it reflects the very real likelihood of actual vindictiveness." 681 F.2d at 1167. The court of appeals found, in certain cases, the addition of charges after indictment would raise a presumption of vindictiveness. 681 F.2d at 1170.

Similarly, Martinez, 785 F.2d at 669, also cited for this proposition, simply notes that retaliation is "far more likely to occur" after an initial prosecution than in the pretrial setting. It does not hold that a presumption of vindictiveness, based upon a realistic likelihood of prosecutorial retaliation, will never apply pretrial.

that Chief Judge Robinson found proved actual vindictiveness and facts that Judge Silberman believed to be suspect and unusual.

First, the government disputes the Court of Appeals' finding that the disparity in treatment accorded to arrestees who pled guilty and those who determined to go to trial demonstrates vindictiveness. The government disingenuously claims it simply reflects the fact that certain defendants opted for a plea offer. In so arguing, the government attempts to rely upon plea bargaining that never occurred and to escape the implications of the initial charging decision in this case.

It is incredible that the government claims that this difference in treatment can be explained by plea bargaining, when the record clearly shows that those who paid $50 had no idea they were accepting a plea bargain and that those who opted for trial had no way of knowing that they faced an additional charge until arraignment.[8/] As Chief Judge Robinson found, there can be no plea bargaining when one side knows nothing of the alleged plea offer. Judge Mikva correctly found that plea bargaining played no part in this disparate treatment. App. at 30a. Accordingly, the addition of a charge cannot be justified on that basis.

In addition, the peculiar character of the initial charging decision in this case underscores the vindictiveness demonstrated by the disparity in treatment between those who forfeited collateral and those who chose trial. As found by the Court of Appeals, the initial charging decision, unlike that in Goodwin and in the vast majority of cases, provided the entire basis for resolution of this case. App. at 12a. Under the magistrate's citation system, a measure of the societal interest in the prosecution was made, and one charge, with a $50 forfeiture of collateral, was provided. Yet, for only those defendants who exercised their right to trial, a second charge was added. The

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8/ As shown in the record, the Assistant U.S. Attorney freely admitted that no communications occurred between himself and the defendants between arrest and arraignment. Tr. 47. It is thus impossible for the government credibly to claim that the second charge resulted from plea bargaining.

stark departure from the initial and binding charging decision gives rise to an overwhelming inference that the second charge was added by the prosecutor to punish the defendants not for the alleged crime they committed, but for the exercise of their right to trial.

Indeed, for that reason, this case is more similar to Thigpen than to Goodwin. In Thigpen, as here, a preliminary proceeding, through the Justice of the Peace Courts, was available to resolve the entire controversy. 468 U.S. at 28 n.2. Those who desired to appeal the outcome of the proceeding were free to do so and were entitled to a trial de novo. Id. The Thigpen Court found that an increase in charges upon appeal justified a presumption of vindictiveness because of the likelihood that the prosecutor would seek to punish those who insisted on further proceedings. 468 U.S. at 30-31. Here, the same likelihood exists, and a presumption of vindictiveness should also apply.

The government claims that the Court of Appeals also erred in finding this case distinguishable from Goodwin because here the "simplicity and clarity of both the facts and law" left little room for the exercise of charging discretion. In the government's view, the finding ignored the fact that no United States Attorney had made an analysis of the case until the defendants determined not to forfeit collateral. The government ignores the fact that the result in Goodwin depended on this Court's finding that the possibility of new facts or analysis to support a pretrial increase in charges decreases the likelihood of vindictiveness. Where, as here, the government has revealed the absence of such new facts and analysis, the likelihood that vindictiveness explains the added charges becomes more pronounced.9/ In these circumstances, it is difficult to believe

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9/ A departure from an earlier charging decision in the absence of new facts clearly raises the specter of vindictiveness. See Martinez, 785 F.2d at 669.

If the additional charge 'aris[es] out of the
(continued...)

that the attachment of additional criminal exposure to only those who went to trial was based upon a re-evaluation of their conduct.10/

The government's contention that the Court of Appeals erred in finding that the prosecutor had an "institutional" stake in retaliating against the defendants in this case also should be rejected. The government incorrectly alleges that the appellate court cited no facts to support this finding, when the Court of Appeals cited a number of factors contributing to the burdensomeness of ~~this~~ case and thus to the government's institutional stake in avoiding trial: (1) a large group of defendants; (2) a case involving defendants who threatened to go to trial on what the government termed "petty offenses;" (3) the presence of a number of defendants proceeding pro se; (4) the intention of many defendants to raise First Amendment issues; and (5) the likelihood that a drawn-out trial would ensue. App. at 10a. It was clear to the Court of Appeals, and should be apparent to any objective observer, that the government had every reason to seek to avoid this trial. The appellate court correctly noted that such an institutional stake by a prosecutor to exercise charging discretion to discourage the assertion of rights was found to justify a presumption of vindictiveness in Blackledge v. Perry, 417 U.S. 21 at 27 (1974).11/

9/(...continued)
same nucleus of operative facts as the original charge,' a presumption of vindictiveness is raised. United States v. Robinson, 644 F.2d 1270, 1272 (9th Cir. 1981). If, however, the second charge is unrelated to the first, the presumption does not arise. See id. at 1273.

10/ For this reason as well, the appellate court found no harm in binding the prosecutor to the charging decision made by the arresting officers in this case. App. at 12a. It also noted that the government is bound only to the extent it lacks "a legitimate and articulable reason for changing that decision." Id.

11/ See also Thigpen, 468 U.S. at 31:

> [T]o the extent the presumption reflects 'institutional pressure that . . . might subconsciously motivate a vindictive

(continued...)

If there could be any remaining doubt that the prosecutor in this case was determined to chill the defendants' exercise of rights, as the Court of Appeals found, this doubt was removed by the government's decision to drop the added charge when the aggregation of offenses triggered a right to a jury trial. The government's contention that this move was nothing more than an innocuous decision that the case did not warrant the commitment of resources necessary for a jury trial defies calm response: it is as if the government believes that misconduct unabashedly admitted is less blameworthy. Indeed, the government freely admits dropping the charge to avoid the necessity "needlessly to spend additional resources." Pet. at 10, emphasis added. Clearly, the expenditure was needless and dropping the charge proper only if no legitimate reason existed to bring it in the first place.

It is apparent, and the Court of Appeals so held, that no valid basis existed for addition of a charge and that the prosecutor's upping of the ante was calculated to punish the defendants for insisting on a trial. When this retaliatory move had the result of triggering a right to a jury trial, the government moved to cut off this avenue as well. Undeniably, the government used its charging authority at every juncture improperly to penalize the respondents.

2. The government also contends that the prosecutor's offer at trial to permit defendants to pay $50 in full satisfaction of the remaining charge constitutes plea bargaining and vitiates its earlier attempt to punish the defendants who opted for trial. This argument is untenable.

11/(...continued)
prosecutorial . . . response' it does not hinge on the continued involvement of a particular individual. A district attorney burdened with the retrial might be no less vindictive because he did not bring the initial prosecution. Indeed, Blackledge referred frequently to actions by 'the State,' rather than 'the prosecutor.'

In Bordenkircher v. Hayes, 434 U.S. 357 (1978), this Court found actual vindictiveness in the prosecutor's threat to seek more severe charges if the defendant did not plead guilty to a lesser charge. However, the Court found that such conduct was justified solely by the importance of plea-bargaining to the criminal justice system (434 U.S. 364); the value which the threat of increased charges has in this system (434 U.S. 365); and the arguably equal bargaining position which a "knowing" defendant has by virtue of the "give and take" of plea bargaining, where he is free to accept or reject the government's offer (434 U.S. 362).

Relying on Bordenkircher, the prosecutor asserts that enhancement of charges to persuade a defendant to plead guilty is a routine prosecutorial tactic and is part and parcel of the plea bargaining process. Yet, as the District Court and the Court of Appeals found, no plea negotiations occurred in this case. App. at 56a-57a; 30a; 35a. The increase in charges here occurred at arraignment and arose from the defendants' decision to go to trial, not from plea negotiations. Thus, it was purely retaliatory.

Nor does the government's announcement at trial of the availability of forfeiture of collateral qualify as plea bargaining and rehabilitate its conduct. On the day of trial, the added charge was dropped as a first order of business to remove the right to a jury trial. Tr. 3. By the time the government announced its supposed plea offer, the added charge was gone. Tr. 21. It is self-evident, therefore, that the addition of a charge cannot be justified by plea bargaining, because it arose outside of the context of plea negotiations and was dropped before the supposed plea was announced.

As Goodwin makes clear, the ban against prosecutorial vindictiveness is a limit on prosecutorial action. It bars the bringing of charges calculated to punish a defendant for the exercise of rights. Charges that are vindictively motivated, that do not rise from the plea negotiation process, and of which

defendants have no notice, cannot be salvaged under any case decided by this Court.

3. Similarly, the government fails to substantiate its claim that the Court of Appeals was fundamentally wrong in upholding the dismissal of the sole remaining charge. Pet. at 12. Rather, it is clear that the Court of Appeals properly affirmed the district court's order of dismissal where the record below demonstrated both that this case presented a realistic likelihood of vindictiveness and that the remedy ordered in this case did not constitute an abuse of discretion.[12/] App. at 31a.

As noted by the Court of Appeals, "[t]he government essentially contends that when confronted with prosecutorial vindictiveness, a court has authority only to dismiss the additional, 'tainted' charge.'" Id. According to the government, the failure of the Court of Appeals to limit the remedial authority of the district court in this case renders its ruling "plainly in error."[13/] Pet. at 13. But, as the Court of Appeals found below, neither reason nor case law supports the government's position.

The doctrine of prosecutorial vindictiveness was designed by the Supreme Court "to be largely prophylactic in nature" (App. at 14a) -- i.e., not only to protect the present defendant from vindictiveness but also to prevent the chilling of the exercise of rights by other defendants in the future. United States v. Motley, 655 F.2d 186, 188 (9th Cir. 1981). See also United

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12/ With respect to the requisite standard of review, the Court of Appeals stated as follows:

> The choice of remedy for governmental misconduct rests within the sound discretion of the lower court; an appellate court may reverse an order remedying such misconduct only if the order constitutes an abuse of discretion. See United States v. Artuso, 618 F.2d 192, 196 (2d Cir.), cert. denied 449 U.S. 861.

App. at 5.

13/ In so casting its argument, the government apparently concedes its inability to meet the "abuse of discretion" standard that the Court of Appeals found applied to the remedy issue.

States v. Owen, 580 F.2d 365, 367 (9th Cir. 1978) (dismissal of indictment based on governmental misconduct used as a prophylactic tool for discouraging future deliberate governmental impropriety of a similar nature). To hold that dismissal of the additional "tainted" charge is the only available remedy would vitiate the deterrent effect of the doctrine (App. at 14) and would render as a nullity its prohibition against prosecutorial vindictiveness. If, as the government argues, the only remedy available in cases of vindictive prosecution is dismissal of the additional charge, then the prosecutor will always have the option available to dismiss the charge before a ruling on vindictiveness can occur. He will have no incentive not to engage in misconduct.

Further, as in the instant case, the prosecutor's misconduct and its consequential harm may go unchecked. For example, the trial court in this case found that, in retaliation for exercising their right to a trial, the government vindictively brought an additional charge against the defendants. Consistent with its prior conduct in penalizing the defendants' exercise of their right to a trial, the government dropped the additional charge after the defendants successfully moved for a jury trial. Through its voluntary dismissal of the additional charge, the government sought to deprive the defendants of a jury trial, insulate itself from sanction, and tie the court's remedial hands. Under the circumstances, it was incumbent upon the district court to protect defendants from such misconduct. It was equally necessary for the Court of Appeals to refuse to "countenance the government's attempt to so vitiate the prohibition against prosecutorial vindictiveness." App. at 14a.

Clearly, dismissal of the added charge is the usual judicial remedy in vindictive prosecution cases. The Court of Appeals acknowledges this to be so. However, in rejecting the government's argument, the Court of Appeals properly concluded that dismissal of the added charge is not, and should not be, the only remedy available to trial courts. Indeed, the government's

petition cites no case which so limits the remedial powers of courts in vindictive prosecution cases.

The government relies on United States v. Morrison, 449 U.S. 361 (1981), to argue that dismissal of the remaining charge violated the general rule that remedies should be tailored to the injury suffered. Simply stated, its reliance is misplaced. In Morrison, the Supreme Court reasoned that where a violation of the Sixth Amendment right to counsel did not render assistance of counsel ineffective and where there were other available remedies in the event of any harm, dismissal was not an appropriate remedy.

However, where, as here, a prosecution has been vindictively brought, it is the very act of prosecuting and its effect on the future exercise of rights which is the harm to be remedied. The Morrison court did not confront the harm of vindictiveness nor did it address the appropriateness of a remedy in the context of vindictive prosecution. Indeed, in the case at bar, where the harm of vindictiveness has been found and where there are no other remedies, dismissal fully comports with the Morrison directive to tailor relief appropriately. 449 U.S. at 364.

Similarly, Smith v. Phillips, 455 U.S. 209-(1982), United States v. Payner, 447 U.S. 727 (1980) and United States v. Mitchell, 322 U.S. 65 (1944) do not mandate a reversal of the Court of Appeals' ruling. In fact, the issue of vindictive prosecution and an appropriate remedy for such vindictiveness did not arise in any of these cases. In Smith, the Supreme Court concluded that a prosecutor's failure to disclose potentially compromising information about a juror did not deprive the defendant of his due process right to a fair trial where a post-trial hearing found no juror bias. Where, as here, it is the very act of prosecuting which constitutes the government's misconduct, reliance on a "fair trial" analysis is ludicrous. Further, in Payner, where the defendant suffered no violation of his constitutional rights, and in Mitchell, the Supreme Court held that, in exercising supervisory powers, courts are not

authorized to suppress evidence admissible under the exclusionary rule of the Fourth Amendment notwithstanding governmental misconduct. However, both the Payner court and the Mitchell court made no attempt to broaden the sweep of their holdings;[14/] and thus, the government's attempt to suggest that Payner and Mitchell limit the general remedial powers of courts is ill-founded.

Finally, the government's assertion that the Court of Appeals' decision to uphold dismissal of the remaining charge conflicts with decisions of the Ninth and Sixth Circuits is a gross exaggeration and flagrant attempt to "create" a conflict among the circuits. Admittedly, in both United States v. Hollywood Motor Car Company, 646 F.2d 384 (9th Cir. 1981), rev'd on other grounds, 458 U.S. 263 (1982), and United States v. Andrews, 633 F.2d 449 (6th Cir. 1980) (en banc), cert. denied, 450 U.S. 927 (1981), the Ninth and Sixth Circuits respectively found that the ordinary remedy for prosecutorial vindictiveness is dismissal of the augmented charge. Neither case held, or even suggested, that dismissal of the augmented charge is the only remedy. In both Hollywood Motor Car Company and Andrews, the obvious remedy of dismissing the augmented charges was available to the respective courts. Consequently, both the Ninth and Sixth Circuits, unlike the Court of Appeals here, could dismiss the augmented charge as well as sanction the government's misconduct.

Moreover, the court in Hollywood Motor Car Company did not find dismissal of the original charge to be an abuse of discretion; rather, it fashioned its own remedy after finding prosecutorial vindictiveness.[15/] Likewise, the Andrews court was

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14/ In fact, the Payner court expressly limits its holding. See Payner, 447 U.S. at 737 n.8 ("our decision today does not limit the traditional scope of the supervisory power in any way. . . .").

15/ In Hollywood Motor Car Company, the trial court had concluded that there was no prosecutorial vindictiveness. After determining that the trial court was in error, the Ninth Circuit went on to discuss remedial aspects. Thus, the court of appeals in Hollywood Motor Car Co. was not in the posture of reviewing a district court's remedy for abuse of discretion.

not confronted with a determination of whether the dismissal of an original charge constituted an abuse of discretion. Indeed, with the exception of one passing reference to the "ordinary" remedy (633 F.2d at 455), the Andrews court never addressed the issue of remedying prosecutorial vindictiveness.16/

Thus, the Court of Appeals decision to uphold Chief Judge Robinson's dismissal of the remaining charge in light of the particular and undisputed facts of this case, notwithstanding its recognition of the extreme nature of the remedy, does not create a conflict among the circuits, constitute an abuse of discretion, or establish erroneous precedent warranting this Court's review.

4. Finally, the government attempts to elevate its concern for administrative efficiency over the defendants' due process rights by asserting that this Court should grant certiorari in this case to undo alleged damage that this decision poses to the functioning of the magistrates' citation system. This contention is also without merit.

The government's concern for the effect of this decision on the functioning of the magistrates' citation system in mass arrest cases is clearly a smoke screen. That system is not the issue here. It is the conduct of the government in proceedings subsequent to the magistrates' citation system that is at issue; and the government's prediction of disaster does not withstand analysis.

The government claims that the Court of Appeals' decision wrongly will not permit prosecutors to exercise a "technical precision" not possessed by arresting officers in drawing up informations. The driving need for this exercise is unsubstantiated. As the Court of Appeals correctly pointed out, in mass arrest cases, the decisions of arresting officers are binding on those who opt for summary procedures. It is

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16/ In Andrews, the Sixth Circuit, after finding that the trial court's application of a per se appearance of vindictiveness standard was improper, vacated the judgment of the district court and remanded the case for further proceedings. As a consequence, the court of appeals in Andrews never discussed remedial aspects.

incongruous to argue that the same decision, by itself and without additional information, becomes inappropriate when an arrestee opts for trial.17/

The government's argument with respect to the havoc this decision will allegedly wreak on the functioning of the magistrates' citation system in mass arrest cases is also unpersuasive. It fails to acknowledge the narrowness of the holding in this case, a holding prompted by unusual prosecutorial maneuvering which, if repeated, should not be condoned. This holding will not complicate mass arrests -- indeed, the Court of Appeals has suggested a means to avoid the misconduct that occurred here. If properly applied, the only effect of this decision will be salutary for all concerned -- with defendants' due process rights properly protected.18/

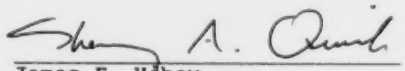
17/ This is not to imply absolutely, as the government does, that the decision by certain defendants to use summary procedures requires the government to treat all defendants identically. Rather, the availability of summary procedures establishes a reliable measure of the societal interest in the criminal proceeding. When the government departs from this charging decision without warning, for only those defendants who go to trial, it is clear that the additional charge is retaliation, not legitimate prosecutorial action. For this reason, the government's citation of Newman v. United States, 382 F.2d 479, 481-82 (D.C. Cir. 1967), for the proposition that the prosecutor is not bound to treat persons who have committed the same legal offense similarly is unavailing. The accused prosecutorial misconduct is not selective prosecution; it is prosecutorial retaliation. The difference in treatment of defendants is relevant to the extent it highlights retaliation.

18/ The government's claim that the holding in this case will bind prosecutors to an officer's initial charging decision is unavailing. While factually similar cases may arise in the future, it is a simple matter for the government to restrain itself from the retaliatory addition of charges, without notice, for defendants who opt for trial. Its complaint that the opportunity to refute the presumption of vindictiveness is empty because the Court of Appeals did not accept its explanation here fails to recognize that both the appellate and trial court acknowledged and correctly rejected the explanation. App. at 6a, Tr. 49. Indeed, this explanation was nothing more than a hollow recitation of the standard for exercise of prosecutorial discretion -- with no indication whether and how it was applied. The government's claim that Bordenkircher may not be satisfied by a warning on the citation that failure to forfeit collateral may result in the addition of charges can only be based on an unduly confined and untenable reading of that case.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court deny the government's petition for a writ of certiorari.

Respectfully submitted,



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December 31, 1987

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day December, 1987, a copy of the foregoing Respondent's Brief in Opposition, Motion of Judith Hand for Leave to Proceed In Forma Pauperis, and Affidavit in Support of Motion to Proceed In Forma Pauperis has been served by first class mail, postage prepaid to: Daniel Ellenbogen, Esq., 3144 Plyers Mill Road, Kensington, MD 20895; Carol Bellin, 12 Thorpe Street, Somerville, MA 02143; Rita Toll, 11 Seaverns Avenue, #5, Jamaica Plains, MA 02130; JoEllen Childers, 1644 Newton Street, N.W., Washington, D.C. 20010; Mindy Washington, 230-14 88th Avenue, Queens Village, NY 11427; Jake Weinstein, 44 Judson Avenue, New Haven, CT 06511; Teri Galvin, 84 D Reservoir Avenue, River Edge, NJ 07661; Marge VanCleif, 196 Mansfield Street, New Haven, CT 06511; Chris Meyer, 6612 Clemens #1 West, St. Louis, MO 63130; J.D. Hearn, RR#1, Box 373, Forrestburg, NY 12777; Theresa Fitzgibbon, 564 Centre Street, Trenton, NJ 08611; Virginia Senders, Pelham Hill Road, Shutesbury, MA 01072; Sebastian Graber, Esq., 1019 King Street, Alexandria, VA 22313; and Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530.

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